Washington University Jurisprudence Review

Volume 2 | Issue 2

2010

Beyond Separation and Neutrality: "Non 'Market Participant'" As the Central Metaphor of Religion Clause Jurisprudence

James R. Beattie Jr.

BEYOND SEPARATION AND NEUTRALITY: "NON 'MARKET PARTICIPANT'" AS THE CENTRAL METAPHOR OF RELIGION CLAUSE JURISPRUDENCE

JAMES R. BEATTIE, JR.*

A metaphor has always dominated the Supreme Court's religion clause jurisprudence. The metaphor prescribes the proper legal and political relationship between religion and government; it is a constitutional norm. This article traces the historical development of this central metaphor—from separation to neutrality—and finds both metaphors lacking in normative adequacy. These inadequacies lead to the proposal of a new metaphor: government as a "non 'market participant.'" This metaphor essentially combines Justice Holmes's "marketplace of ideas" with the "market participant" in the Court's Dormant Commerce Clause jurisprudence, but with an important twist. The normative obligations of the new metaphor prevent government from regulating the behavior of citizen competitors in the "religion market" (free exercise) and from becoming a competitor or engaging in competitor behavior in that market (establishment). Both sets of governmental duties are aimed at achieving the single goal of maximal religious liberty for citizens.

INTRODUCTION

A metaphor has always dominated the Supreme Court's religion clause jurisprudence. The Court's use of metaphor does not necessarily indicate some deeper failure in constitutional interpretation. Rather, it indicates that the meaning of the constitutional text and our understanding of the historical setting in which it was drafted are radically under-determined.[1] The text and

* Associate Professor of Law, Capital University Law School. I want to thank Professor Rachel Janutis and Capital University Law School for the invitation to present an earlier draft of this paper at the Fall Faculty Lectures Series. I also want to thank Mr. Paul Bryson for his excellent research assistance.

[1] The constitutional text reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .";U.S. CONST. amend. I.

the drafting history can possibly eliminate a handful of implausible interpretations[2] but they cannot justify the further selection of one central interpretation from among the remaining plausible ones.[3] To make that selection requires a shift in focus from text and history to conceptions of constitutional structure and political morality.[4] This shift in focus is the primary function of the Court's chosen metaphor in religion clause jurisprudence. Because the constitutional language and the drafting history are capable of carrying so many plausible and different, perhaps inconsistent, meanings, the Court has availed itself of a central metaphor to make sense of it all.[5]

---

[2] For example, Justice Story and Chief Justice Rehnquist's "nonpreferentialism"—government can *prefer* Christian religion over other religions as long as it does not *prefer* any Christian sect over another (Story's interpretation) or as long as it *prefers* religion in general over non-religion (Rehnquist's interpretation)—can probably be eliminated as an implausible interpretation of the text and drafting history because such language was repeatedly rejected by the drafters. *See* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 151 (L. De Pauw ed., The Johns Hopkins Univ. Press 1972) (Senate Journal) (Sep. 3, 1789). For Justice Story's interpretation, see 2 JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1877 594 (The Law Book Exchange Ltd. 2005) (1851). For Chief Justice Rehnquist's interpretation, see Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). For an extended critique of nonpreferentialism, see Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1985/86).

[3] Taking one example, the text and drafting history apparently cannot resolve the question of whether free exercise accommodations were required by the constitutional text or by the drafters. *See, e.g.,* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing for accommodations for free exercise) *and* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing against accommodations for free exercise).

[4] Compare Professor Michael Dorf's insight when he writes:

> In addition to constitutional text, history, and structure, normative considerations play an important role in fixing constitutional meaning. In other words, discussion of the question 'What does the Constitution mean?' will be informed by, and sometimes even collapse into, a discussion of the question 'What *should* the Constitution mean?' Thus, when asking whether the Constitution protects rights . . . we should also ask whether the Constitution *ought* to protect rights . . . .

Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1194-95 (1996) (emphasis added).

[5] Although I do not believe a choice of metaphor or norm in this area of law can be avoided, the textualist and the originalist will not be pleased with this shift in focus. Of course, the textualist and the originalist face their own unique

The Court's chosen metaphor primarily has been employed to prescribe (and to proscribe) the proper legal and political relationship between religion and government, and has prescribed (and proscribed) how lower courts ought to conceive of that relationship when applying the law. The chosen metaphor's primary function is therefore normative; it constitutes a constitutional norm.[6]

The use of metaphor in constitutional interpretation is not that rare. Much of the Court's free speech doctrine, for example, can be understood as drawing on, and as drawing out, the implications of the metaphor of the "marketplace of ideas"[7] or the competing

---

problems. The textualist is committed to let the text "speak for itself." The problem with this approach is that words do not come with their unique meanings or significance attached; or in the case of the First Amendment, the words come with many plausible meanings attached. Professor Philip Bobbitt succinctly writes: "Every word in the Constitution is not equally significant, and some of its most explicit texts are also its most trivial. More important, in a Constitution of limited powers what is *not* expressed must also be interpreted." PHILIP BOBBITT, CONSTITUTIONAL FATE 38 (1982) (emphasis in original). The originalist's approach is committed to a particular historical era's—usually the founding era's—interpretation of the Constitutional text. A major difficulty with this approach is that while historical research possibly can establish the "negative" of a particular textual interpretation, if the founders rejected it, for example, it cannot establish conclusively the meaning of the text that they adopted. *See supra* note 2. Again, Professor Bobbitt correctly writes: "[W]hen a [constitutional] passage was *adopted* we are thrown back on the puzzle of varying and sometimes incompatible intentions left unexpressed or, in the case of trade-offs for votes on other matters, indecisive [] language chosen to satisfy objectives other than clarity." BOBBITT, *supra,* at 13. For an excellent discussion of the difficulties associated with originalism—both the difficulties (1) in deciphering the historical meaning of constitutional text and Framers' intent, as well as (2) in deciding the normative force such meaning, if it can be deciphered, should carry today (the "dead hand" problem), see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BOSTON U. L. REV. 204 (1980). I am well aware that there is a new "flavor" of originalism afoot today—"original meaning (original public meaning) originalism." *See, e.g.*, Randy E. Barnett, *The Relevance of Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 405 (1996). But for the life of me, I do not see how it avoids the difficulties associated with the older versions. *See, e.g.*, Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) (an extended contemporary critique of the new version of originalism).

[6] If the reader wishes to substitute the word "norm" for "metaphor" throughout, I have no objection. The Court's use of metaphor is primarily normative. But the notion of jurisprudence based on metaphor is accurate, I believe, in describing how the Court gets embroiled in the "imagery" of the norm contained in the metaphor. And besides, as Groucho Marx said, I never metaphor I did not like!

[7] The "marketplace of ideas" is attributed to Justice Holmes, even though he never used this exact phrase. *See* Abrams v. United States, 250 U.S. 616, 630

metaphor of the "town hall meeting."[8] Similarly, the Court's jurisprudence explaining the reach of the Commerce Clause flowed, for several years, from the metaphor of the "stream of commerce."[9] In many cases where the meaning of the constitutional text and the drafting history are radically underdetermined, the Court has availed itself of the use of metaphor to provide a normative focus and guide to applying the law. The Court's religion clause jurisprudence is not special in this regard.[10]

The following section briefly traces the historical development of this central metaphor—from the metaphor of separation to the metaphor of neutrality—and along the way highlights some of the more pertinent successes and failures of each proposed metaphor. On balance, both metaphors lack in normative adequacy. The metaphor of separation is shown to be inadequate because it places the protection of free exercise in jeopardy and entails discrimination against religion in cases where government aid or support is universally available, all the while unnecessarily pitting the prescriptions of free exercise and establishment against each other. The metaphor of neutrality is shown to be inadequate because it proscribes the use of the compelling interest test—effectively sacrificing the fundamental status of free exercise—and does not require non-discrimination against religion in cases of universally available government aid, all the while improperly embodying a preference for majority religion that is inconsistent with our nation's commitment to denominational neutrality.

Section II then briefly sets forth a proposal for a new central metaphor for religion clause jurisprudence—the metaphor of

---

(1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

[8] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) (the metaphor of the "town hall meeting" prescribes potentially greater government regulation of speech because "what is essential is not that everyone shall speak, but that everything worth saying shall be said").

[9] *See, e.g.*, Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[10] Perhaps this is as it should be, especially where we are dealing with the legal and political treatment of religion. As Professor Harold Bloom writes, "[t]heology necessarily is a system of metaphors." HAROLD BLOOM, JESUS AND YAHWEH: THE NAMES DIVINE 98 (2005).

government as a "non 'market participant.'"[11] Once the elements of the metaphor are explained, this section will develop the underlying doctrinal construct that draws on, and draws out, the implications of the proposed metaphor. It will then set out some preliminary comparisons between the proposed metaphor of non "market participant" and the historic metaphors of separation and neutrality.

Finally, section III presents in brief outline how the metaphor of non "market participant" applies in Free Exercise and Establishment Clause cases. It will also attempt to address the more pertinent anticipated criticisms of my proposal.

I. THE HISTORY OF THE CENTRAL METAPHOR: FROM SEPARATION TO NEUTRALITY

A. Separation

When the Supreme Court reassesses its religion clause jurisprudence in earnest,[12] it relies upon the central metaphor of "separation" or "the wall of separation" between church and state[13] to focus and prescribe the proper legal and political relationship between religion and government. The metaphor of separation suggests powerful normative imagery of a "protective" wall

---

[11] Depicting government as a non "market participant" is not meant to imply that it is participating in a "non market." As will be explained, it is meant to imply that government cannot participate in the "religion market." I employ this language to maintain symmetry with my use of the "market participant" metaphor found in the Court's Dormant Commerce Clause jurisprudence. If the reader prefers to substitute the phrase "market non-participant" throughout, I have no objection. I thank Professor Douglas Laycock for suggesting this clarification.

[12] A major factor spurring the reassessment of the Court's religion clause jurisprudence was the sheer number of state cases that resulted from incorporation. For "incorporation" of the First Amendment, see Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment) and Everson v. Bd. of Educ. of Ewing TP, 330 U.S. 1 (1947) (incorporating the Establishment Clause into the Due Process Clause of the Fourteenth Amendment).

[13] *See, e.g.*, *Everson*, 330 U.S. at 16 ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'" (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)), referencing Jefferson's phrase of "building a wall of separation between church and state" because "[c]oming as this does from an acknowledged leader of the advocates of the measure [the First Amendment], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.").

interposed between church and state, which protects other norms assumed to prescribe the behavior of parties on both sides of the wall. The prescription to be followed under this metaphor is no breaching the wall—not even "the slightest breach"[14]—for the good and the protection of both church and state. Proscribing all contacts between church and state will presumably protect both civil liberties "from religious interference" and religious liberties "from the invasions of the civil authority."[15] On whichever side of the wall of separation we find ourselves, the prescription will safeguard the "good" to be found on our side.

It cannot be overstated how much the adoption of this metaphor significantly advanced the Court's religion clause jurisprudence, especially in the field of free exercise. Prior case law had allowed government to ban outright central religious tenets and practices upon a deferential finding that they were "subversive of good order."[16] The Court now correctly recognizes that government regulation of the exercise of religion requires the same heightened justification employing a compelling interest and the use of the least restrictive means applicable to other fundamental interests.[17] Government regulations of religious exercise, both direct and indirect, improperly "breach the wall of separation"—and only the most paramount interests will justify such incursions.[18]

Unfortunately, the metaphor of separation also contains the seeds of its own undoing. If the metaphor does not allow government to regulate religious exercise because this improperly breaches the wall of separation, can government "breach" the wall again to lift such regulations once they are in place? Why allow one breach but not the other? If the prescription is to allow no breaches, then the distinction between the first and second

---

[14] *Everson*, 330 U.S. at 18.

[15] *Id.* at 15 (quoting Harmon v. Dreher, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843)).

[16] Reynolds v. United States, 98 U.S. 145, 164 (1878). For the disturbing history of the Court's prior analysis of free exercise, see *Reynolds*, 98 U.S. at 145; Davis v. Beason, 133 U.S. 333 (1890); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

[17] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972); Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136, 141 (1987); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 835 (1989).

[18] *See, e.g.*, *Sherbert*, 374 U.S. at 406 ("[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation [of free exercise].'" (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

("corrective") breaches cannot be justified under the metaphor of separation. Indeed, the second "corrective" breach simultaneously appears to be prescribed by free exercise and proscribed by establishment under the metaphor of separation. The significant normative advance in religion clause jurisprudence gained by the Court's adoption of the metaphor of separation, which for the first time correctly protects the exercise of religion as a fundamental right, is now in jeopardy.[19]

Furthermore, the metaphor of separation seems to be too blunt an instrument for analyzing government "establishment" of religion. A plausible reading of the metaphor proscribes every form of public aid or support of religion.[20] Nevertheless, this is too broad a proscription. Although it will safeguard against the historic problems associated with government-sanctioned religion, it will also entail discrimination against religion in cases where government aid or support is universally available.[21] Notions of

---

[19] *See, e.g.*, *Sherbert*, 374 U.S. at 415 (Stewart, J., concurring) ("[T]he Establishment Clause as construed by this Court not only permits but affirmatively requires South Carolina equally to deny the appellant's claim for unemployment compensation [because] . . . the Establishment Clause forbids 'every form of public aid or support for religion.'").

Justice O'Connor recognizes this conflict between the demands of disestablishment and the demands of free exercise under the metaphor of separation when she writes, "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause." Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). For an extended treatment of this argument, see also James Beattie, *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 CATH. LAW. 367, 370, 398-99 (2004).

[20] *See, e.g.*, Abington v. Schempp, 374 U.S. 203, 217 (1963) (where the majority opinion embraces the extreme separationist reasoning of Justice Rutledge's dissent in *Everson,* stating, "[t]he [First] Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.") (citing *Everson*, 330 U.S. at 31-32) (Rutledge, J., dissenting).

[21] *See, e.g.*, *Everson*, 330 U.S. at 16 ("language of the [first] amendment commands that [government] cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual[s] . . . *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.") (emphasis added).

As public welfare legislation has grown in the past century, so has the potential conflict between the prescriptions (and proscriptions) of establishment and free exercise under the metaphor of separation. Compare Justice Rehnquist's insight when he writes, "the growth of the social welfare legislation

fairness and respect for fundamental rights require that only certain types of public aid and support to religion be proscribed by religion clause jurisprudence, but the metaphor of separation cannot justify making such a distinction.

Finally, the symmetrical nature of the metaphor of separation does not track the asymmetrical language of the constitutional text. The constitutional text places restrictions only on government,[22] but the metaphor of separation places restrictions on both government and religion. Neither government nor religion can enter the other's domain. This dual restriction has a potentially pernicious consequence. It potentially justifies barring the religious voter and candidate from participation in political processes.[23] Any legal norm with such potentially discriminatory consequences to our fundamental civil liberties should give us pause.

Over time, members of the Court have voiced concerns similar to those I have raised.[24] Partly because of the normative inadequacies of the metaphor of separation, and partly because of a change in the membership of the Court, by the late 1980s the use of the metaphor of separation slowly declined in the Court's religion clause jurisprudence.[25]

---

during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses, since such legislation touches the individual at so many points in his life." Thomas v. Review Bd., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

[22] *See supra* note 1.

[23] *See, e.g.*, *Everson,* 330 U.S. at 16 ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.") (emphasis added).

[24] *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (stating that monitoring the federal monies for the Adolescent Family Life Act in order to avoid advancement of religion "presents us with another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid.").

[25] This is not to say that the metaphor of separation no longer plays an important part in the Court's religion clause jurisprudence; it does. On the free exercise front, the decline of the metaphor of separation probably is more pronounced by both the limitation of the *Sherbert* test to its facts and the acceptance of the new doctrinal test for free exercise in *Employment Div. v. Smith*. However, with regards to establishment, if the *Lemon* test arguably embraces the separation metaphor, and I believe that it does, then the metaphor of separation still survives in the Court's religion clause jurisprudence because *Lemon* has not been overruled—at least not yet. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 859-61 (2005) (basing the holding on the *Lemon* test) and Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (setting forth the *Lemon* test).

Additionally, there have been attempts to correct some of the doctrinal difficulties with the metaphor of separation by, for example, "folding" the entanglement prong of *Lemon* into the effects prong. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233 (1997) *and* Mitchell v. Helms, 530 U.S. 793, 807

B. Neutrality

For the last 25 years or so, a new metaphor for religion clause jurisprudence is taking center stage.[26] It is the metaphor of "neutrality." Because the metaphor of separation can also lay claim to being "neutral,"[27] the new metaphor further specifies that it is government neutrality between religion and *non-religion* that is prescribed. The new metaphor prescribes that government relationships with religion are justified constitutionally if (1) they are intended to aid or support non-religion and (2) they treat (affect) religion and non-religion in the same way, or "evenhandedly," in cases where religion is involved.[28] The recent case law implies that if the second condition is met, then the first condition can be presumed.[29] If government actions essentially ignore the religious aspects of a situation, as demonstrated by their

---

(2000). Of course, this move does not solve all of the difficulties with the doctrinal implementation of the metaphor of separation mentioned above, e.g., the "tension" between free exercise and establishment under the metaphor.

[26] There is an ongoing debate in the literature about whether the Court's use of a central metaphor is "transitional," as I describe it, or "unitary." *See, e.g.*, Carl Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Providers*, 46 EMORY L.J. 1 (1997) (arguing for the "transitional" position) *and* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 43 (1997) (arguing for the "unitary" position: "I believe the Supreme Court has thought itself committed to both separation and neutrality, and that separation and neutrality are two aspects of a consistent understanding of religious liberty.").

Far be it from me to quash any attempt to render the Court's decisions in this area more consistent. The main difficulty I have with the "unitary" position, however, is that the normative implications of the two metaphors are *not* consistent. Even Professor Laycock concedes that "unity" of the two metaphors is only made possible by a "variable choice between the two baselines" of the two metaphors. *Id.* at 70. Accordingly, we need an additional normative justification for a "choice" between prescriptions not justified by the prescriptions of the two metaphors themselves. On balance, the "unitary" position supplants the two metaphors of separation and neutrality with a new central metaphor, as do I, rather than unifies them "consistently."

[27] For example, proscribing every form of government aid or support of religion is arguably "neutral" between religions. It may be wrongheaded, but it is arguably neutral.

[28] *See, e.g.*, Rosenberger v. Univ. of Va., 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion . . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

[29] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion).

evenhanded treatment of religion and non-religion, then government actions remain neutral and are constitutionally permissible.[30]

The new metaphor of neutrality, or evenhandedness, like the metaphor of separation before it, provides courts with powerful normative imagery. It conjures images suggesting the normative pull of the rule of law under which "like cases are treated alike."[31] And it suggests comparisons to equal treatment under the law found in the Equal Protection Clause.[32]

We are still in the early throes of this new central metaphor. The metaphor's implications for understanding the proper legal and political relationships between government and religion have

---

[30] *Id.* The plurality writes:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

See also Mueller v. Allen, 463 U.S. 388, 397 (1983) (emphasis in original):

> Other characteristics of [a tax deduction for parents sending their children to parochial schools] argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded that the state's provision of a forum neutrally open to a broad class of nonreligious as well as religious speakers does not confer any imprimatur of State approval, so here: the provision of benefits to so broad a spectrum of groups is an important index of secular effect.

[31] *See, e.g.*, DALE A. NANCE, LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM 143 (2d ed. 1999) ("One of the core instincts that most people share is the idea that justice, whatever else it may be, entails the requirement of equality. It is often articulated by the maxim, 'Treat like cases alike,' with the implication that one should also, 'Treat different cases differently.'").

[32] For example, the Court partially justifies employing its new metaphor in the field of free exercise by stressing its compatibility with equal protection analysis. Citing to equal protection precedents, the Court states, "[o]ur conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents." Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990).

not been fully worked out.[33] Nevertheless, the early indications are not good.

The most troubling consequence of the Court's adoption of the new metaphor of neutrality is the loss of the compelling interest test in the vast majority of cases involving government regulation of religious exercise.[34] "Our conclusion [is] that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[35] The Court reaches this conclusion because "generally applicable, religion-neutral" laws conform to the prescriptions of the metaphor of neutrality. Such laws are intended to further non-religious interests and they treat (read "burden") non-religious and religious practices in the same way—that is, they are "evenhanded."[36]

Unfortunately, this conclusion undermines the significant normative gains achieved under the metaphor of separation, which correctly protected the exercise of religion as a fundamental right. The new test harkens back to a prior period of religion clause jurisprudence in which the Court showed great deference to

---

[33] For example, the metaphor establishes the constitutional permissibility of government providing "equal aid" to religion and non-religion. But does the metaphor also prescribe that government is *required* to provide such aid? In the context of funding speech, the answer appears to be "yes." *See* Rosenberger v. Univ. of Va., 515 U.S. 819 (1995). In the context of other funding, the answer appears to be "no." *See* Locke v. Davey, 540 U.S. 712 (2001).

[34] The compelling interest test is still applied in the few cases in which government intentionally discriminates against religious practice: cases in which government regulations are specifically directed at the practice *because* the practice is religious, or cases in which government has enacted a system of individual exemptions but refuses to extend that system to qualifying individuals *because* of their religion. *Smith*, 494 U.S. at 884. The Court also distinguishes the holding in *Yoder* by recasting it as a "hybrid situation" in which free exercise interests are conjoined to other fundamental interests that by themselves would receive heightened scrutiny. *Id.* at 881-82. In such "hybrid" cases, the Court is not clear whether it is the free exercise interest that receives the heightened scrutiny or the other fundamental interest to which it is conjoined.

[35] *Smith*, 494 U.S. at 886 n.3. *See also* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

[36] *Smith*, 494 U.S. at 878 ("It is a permissible reading of the text . . . to say that if the prohibiting the [free] exercise of religion . . . is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision [i.e., the regulation treats religion and non-religion in the same way], the First Amendment has not been offended.").

government regulations of religious exercise.[37] Now, government need only demonstrate that its regulation does not target religion and that its regulation applies to everyone, to religious and non-religious practices alike. The presumption that government must justify regulations of religious exercise by only the most paramount interests and by the employment of the least restrictive means, similar to the presumption pertaining to government's regulation of other fundamental interests, is gone. With the loss of this presumption comes the loss of fundamental status under our constitutional system.

Perhaps realizing the significance of this troubling result, the Court attempts to reassure religious practitioners by providing another option for protection of religious exercise. Although the constitutional status of free exercise is no longer fundamental, the Constitution permits statutory protections where these can be enacted.[38] The Court candidly concedes that this lone avenue of protection places minority religions—those religions without the necessary political clout—at a distinct disadvantage. The Court writes:

> It may fairly be said that leaving accommodation [of free exercise] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is the] unavoidable consequence of democratic government . . . .[39]

Of course, the constitutional text makes no such distinction between religious practices "widely engaged in" and those that are not. Presumably, the constitutional protections of free exercise apply to all religious practices. Certainly, other constitutional protections of fundamental interests have not drawn on this distinction, and there is no good reason to draw such a distinction here.[40] In the worst light, the metaphor of neutrality sacrifices the

---

[37] It is not surprising that the Court cites to *Reynolds* with approval, for the Court has returned to the deferential standard employed in this prior period of religion clause jurisprudence. *See, e.g., id.* at 885.

[38] *Id.* at 894 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

[39] *Id.*

[40] Compare Justice Jackson when he writes:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to

fundamental status of free exercise under our constitutional system. In the best light, it sacrifices denominational neutrality between religions in order to gain neutrality between religious and non-religious practices. There is little to recommend in taking such a normative stance.

Turning to the metaphor's application in the area of establishment, it appears to be faring much better, at least in the area of public aid. The metaphor does not proscribe every form of public aid of religion, and in this sense it provides a potentially better-tuned analysis of government aid of religion than found under the metaphor of separation. The new metaphor potentially avoids discrimination against religion in cases where government aid is universally available.[41] However, a significant question remains: does the new metaphor *require* such aid of religion in cases where government aid is universally available, or does the metaphor merely permit it?[42] Again, our notions of fairness and respect for fundamental rights require that discrimination against religion be avoided in all cases where this is possible. Accordingly, in cases where government aid is universally available, it should be required that no distinction be drawn between religion and non-religion.

Finally, there is the concern of how the new metaphor applies to government support of religion, specifically in the area of government religious speech. If government expression supports a particular religious viewpoint, is neutrality maintained by offsetting non-religious government expression or by government expression of many (all?) religious viewpoints? The former requirement will potentially always be met and might allow persistent, ongoing government support for a particular religious viewpoint to the exclusion of other religious viewpoints, as long as

---

> establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[41] *See supra* notes 28-30 and accompanying text.

[42] *See supra* note 33 and accompanying text. The correct answer to this question becomes all the more urgent when combined with the metaphor's treatment of free exercise. If burdens on free exercise are generally permitted under the *Smith* doctrine and benefits to religion are not generally required under *Locke's* rationale, then we are left with the potential characterization of the "proper" relationship between government and religion as little more than government hostility towards religion, where it is permissible for government to levy burdens on religion without the offsetting benefits to religion.

government also engages in non-religious expression. This hardly appears "evenhanded." The latter requirement potentially will be seldom met, if ever. As powerful as the message of government speech is, it is not of unlimited duration. Time constraints on government expression make the latter requirement a near impossibility.

The current case law under the metaphor of neutrality has not solved this problem, settling instead for permitting government religious speech that supports the religious expression of "[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers,"[43] or, allowing government religious speech because it has ties to our nation's history.[44] The former option, even if accurate, cannot explain why the metaphor of neutrality permits government support of only majority religious expression; the latter option cannot explain why the metaphor of neutrality permits government support of only historic religious expression. Neither option pays more than mere lip service to the prescriptions underlying the metaphor of neutrality or evenhandedness. Thus far, the Court's application of the metaphor of neutrality has not solved the proper relationship between government and religion in the area of government religious expression.

II. NON "MARKET PARTICIPANT" AS THE CENTRAL METAPHOR OF RELIGION CLAUSE JURISPRUDENCE

A. Preliminary Considerations

Before I set out my proposal for a new central metaphor for religion clause jurisprudence, addressing a few preliminary considerations is in order. First, I have taken some pains throughout this article to use the phrase "religion clause jurisprudence." The use of this expression is meant to avoid a common misunderstanding in this area of law. Although the constitutional text is composed of two clauses separated by a comma,[45] we should not assume that different interests are embodied in the two clauses. Neither should we make additional assumptions that these different interests are pitted against one

[43] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

[44] *Id.* at 893 ("[I]t is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

[45] *See supra* note 1.

another, nor that a proper reading of text allows for the interpretation of one of the interests or clauses without interpreting the other.[46] The metaphor of non "market participant" prescribes that *both* clauses are directed at achieving the same unitary interest—the protection and preservation of religious liberty.[47] The reason for two clauses rather than one is that each clause prescribes a particular set of duties for government but all government duties are aimed at achieving the unitary interest of religious liberty. Both sets of duties must be followed by government in order to achieve the same fundamental interest of religious liberty for its citizens.[48] The phrase "religion clause jurisprudence" is employed throughout the article in order to emphasize this unitary interest.

Second, if the religious liberty of citizens is the unitary goal of religion clause jurisprudence, then the correlative government duties required to achieve that goal must apply to all citizens without additional qualification. A proposed metaphor that prescribes additional qualifications for citizens to claim the protection of the correlative government duties, such as requiring some citizens to possess additional political clout, is thus

---

[46] For an extended discussion of the problems that result from a "disaggregated" reading of the Religion Clauses, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1007-11 (1990).

[47] Justice Brennan perhaps best captures the "unitary" understanding of religion clause jurisprudence when he discusses the fallacy in the contention that there are two different interests contained in the two clauses:

> The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.

Abington v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring).

[48] The use of the plural "sets of duties" is intended to avoid another serious misunderstanding in the discussion of rights. Often rights are characterized as either "negative" or "positive" depending upon whether the correlative duty (singular) they justify requires the non-interference (negative) or the assistance (positive) of others to the rights-holder. This distinction breaks down on close inspection. *See, e.g.*, JEREMY WALDRON, THEORIES OF RIGHTS 4-12 (1989); JEREMY WALDRON, LIBERAL RIGHTS 24-25, 63-87 (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM 165-92 (1986). All rights ground or justify both negative (non-interference) and positive (protection and aid) correlative duties—it is the duties which are "negative" or "positive," not the rights. *See, e.g.*, HENRY SHUE, BASIC RIGHTS 53 (2d ed. 1980) ("the common notion that rights can be divided into rights of forbearance (so-called negative rights) . . . and rights to aid (so-called positive rights), is thoroughly misguided. . . . It is duties, not rights, that can be divided among avoidance and aid, and protection. And—this is what matters—every basic right entails duties of all three types.").

disqualified as a normatively inadequate metaphor for religion clause jurisprudence.

Finally, a proposed metaphor should track the asymmetrical nature of the constitutional text. The constitutional text places restrictions (duties) only on government, not on religion.[49] The proposed metaphor of non "market participant" does the same.

B. The Metaphor of Non "Market Participant"

The metaphor of non "market participant" essentially combines two metaphors, found elsewhere in constitutional jurisprudence, with one important qualification. First, it references the famous metaphor of Justice Oliver Wendell Holmes: the metaphor portraying free speech protections as a "marketplace of ideas." Similar to Justice Holmes's suggestion that the constitutional protections afforded free speech can be understood best as a "market" in which there is "free trade in ideas,"[50] the proposed metaphor for religion clause jurisprudence suggests that the constitutional protections afforded religious liberty can be understood best as a "market" in which there is "free trade" in religion.

The metaphor does not require that the citizens who are participating in the "religion market" view themselves as participating in such a market, or that they view their religious "trade" as similar to trade in other commodities.[51] For most adherents, nothing could be further from the truth. Moreover, the metaphor is not concerned with the motivation behind the behavior of the participants within the "religion market." It is not wedded to

---

[49] *See supra* note 1.

[50] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes's powerful imagery is worth repeating:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.

[51] Throughout the following discussion I shall use the noun "citizen" to emphasize the "political" obligations placed upon government under the non "market participant" metaphor. Of course, the same protections apply to all "persons" participating in the "religion market," including religious organizations, under the Fourteenth Amendment.

any particular theory of market behavior, such as classical or behavioral economic theory. All this is beside the main point.

The main point is that government, not citizens, must view the religious liberty of its citizens *as if* there is a "religion market" in which private citizens trade, act, and choose their religious beliefs and lifestyles for themselves. Government must recognize these private orderings, choices, and actions as solely determinative of the outcomes of the market.[52] In other words, government is placed under a set of duties to avoid interference with, and to provide protection for, the citizen competitors in the "religion market." The metaphor prescribes a general presumption that government shall make no law "prohibiting the free exercise thereof."

Several contemporary writers have previously stressed the central importance of private ordering in religion clause jurisprudence. For example, Professor Douglas Laycock writes:

> [T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance . . . . But I must elaborate on what I mean by minimizing encouragement and discouragement. I mean that religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible.[53]

The metaphor of non "market participant" requires government to avoid interference with, and to provide protection for, the citizen competitors in the "religion market" and, thereby, also requires that religion is to be left to the private orderings of the citizen competitors as much as possible.

---

[52] Additionally, the metaphor of non "market participant" is not wedded to any particular outcome in the "religion market," as many have assumed Justice Holmes's "marketplace of ideas" was wedded to the outcome of "truth." Obviously, the metaphor of non "market participant" would not allow government to direct the market towards any particular outcome of its liking.

[53] Laycock, *supra* note 46, at 1001-02. See also Professor Michael McConnell when he writes: "The unifying principle [of the Religion Clauses] is that the religious life of the people should be insulated, to the maximum degree possible, from the effect of governmental action, whether favorable or unfavorable." Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 331-32 (1991). I am not claiming, of course, that these scholars would agree with my conception of non "market participant" or with my suggested implementation of the metaphor in section III.

Of course, there may be situations in which government is justified in regulating the private orderings of the "religion market." But again Justice Holmes should be our guide: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law."[54] In the context of religion clause jurisprudence, only the most paramount government interests and the use of the least restrictive means will justify governmental incursions into the "religion market" to regulate citizen competitors. When it comes to the protection of the free exercise of citizens, viewed as competitors in the "free trade" of religion, the metaphor of non "market participant" places government once again under the prescriptions (and proscriptions) of the compelling interest test.

Turning to establishment, the metaphor of non "market participant" also draws upon the metaphor of "market participant" found in the Court's Dormant Commerce Clause jurisprudence, but with an important difference.[55] The Dormant Commerce Clause doctrine of market participant affords states (the legal fiction of) private competitor status in the market and thereby exempts states from the usual limitations placed on their regulatory powers of the market.[56]

The important difference is that the *non* "market participant" metaphor denies such an exemption to government because it bars government from competitor status in the "religion market." Only citizen orderings, choices, and actions should determine the outcomes of the market. The metaphor of non "market participant" interprets the constitutional text that government "shall make no law respecting an establishment of religion" as expressly

---

[54] *Abrams*, 250 U.S. at 630.

[55] *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983); S. Cent. Timber Dev., Inc. v. Dep't of Natural Res. of Alaska, 467 U.S. 82 (1984).

[56] *See, e.g.*, *Reeves*, 447 U.S. at 436-38 ("The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market . . . . Restraint in this area is also counseled by . . . 'the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'") (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

proscribing actions in which government enters the "religion market" as a competitor.[57] When government does enter the "religion market" as a competitor, only the most paramount interests and the employment of the least restrictive means will justify such incursions.

The metaphor of non "market participant" prescribes therefore a general presumption, with correlative sets of duties, that both prevents government from regulating the behavior of citizen competitors in the market (free exercise) and prevents government from becoming a competitor or engaging in competitor behavior in the market (establishment). Both sets of governmental duties, not to regulate competitors and not to be a competitor, are aimed at achieving the single goal of maximal religious liberty for citizens.

C. Preliminary Comparisons

The following section shall address in greater detail how the metaphor of non "market participant" should be applied in free exercise and establishment cases, but a few preliminary comparisons with the Court's historic metaphors are in order here. The metaphor of non "market participant" returns the compelling interest test to its rightful place in free exercise jurisprudence. In this regard, the proposed metaphor sides with the prescriptions of separation and not neutrality. However, the metaphor of non "market participant" avoids pitting the prescriptions of free exercise and establishment against one another. Under both sets of duties, government is directed to take whatever actions are necessary to get out and to stay out of the "religion market."

The metaphor of non "market participant" analyzes establishment through the lens of government engaging in

---

[57] Compare Justice O'Connor's insights when she writes:

> Our Founders conceived of a Republic receptive to voluntary religious expression . . . . Voluntary religious belief and expressions may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practice. . . . In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.

McCreary County v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

"competitor" behavior in the "religion market." If government is competing in another market, however, say providing bus fare to all students, then the metaphor of non "market participant" is not necessarily violated. In cases where public aid or support is made universally available, government provides a prima facie justification that it is not competing in the "religion market" under the metaphor of non "market participant." Accordingly, in cases in which public aid is universally available, the metaphor of non "market participant" sides with the prescriptions of neutrality and not separation.

Finally, the metaphor of non "market participant" generally proscribes government religious speech, at least where it cannot be justified by the most paramount interests and the employment of the least restrictive means. Government religious speech is prima facie "competitor" behavior in the "religion market."[58] Thus far, the justifications proffered by the metaphor of neutrality, the historical pedigree and the majoritarian scope of government religious speech, are neither compelling nor least restrictive. On this issue, therefore, the metaphor of non "market participant" sides with the prescriptions of separation and not neutrality, but perhaps for different reasons.

---

[58] On this issue, the metaphor of non "market participant" cannot explicitly draw on the implications of Justice Holmes's "marketplace of ideas." In the free speech context, government is also a participant in the market. Of course, there is no constitutional text in free speech similar to the disestablishment language in religion clause jurisprudence. Compare Justice Kennedy's observation when he writes:

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all . . . . [T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.

Lee v. Weisman, 505 U.S. 577, 591 (1992). The metaphor of non "market participant" adds the prescription to Justice Kennedy's analysis that government should not participate in religious debate or expression, unless it can be justified by paramount interests and the least restrictive means.

III. HOW THE METAPHOR OF NON "MARKET PARTICIPANT" SHOULD APPLY IN FREE EXERCISE AND ESTABLISHMENT CASES

A. Non "Market Participant" and Free Exercise

Fortunately, there is significant guidance for how the metaphor of non "market participant" should apply to free exercise: courts are already applying it, or something very close to it, in cases involving federal statutory law.[59] Shortly after the Supreme Court moved to its new neutrality metaphor for free exercise, Congress responded and enacted the Religious Freedom Restoration Act (RFRA) in an attempt "to restore" protection for religious liberty in the free exercise context.[60] Under RFRA, as currently

---

[59] Additionally, eighteen states apply "heightened scrutiny" to free exercise claims either through enactments of state "mini-RFRAs" or through existing state constitutional provisions, which have been interpreted to require the compelling interest standard or something like it. For state "mini-RFRAs," see Alabama Religious Freedom Restoration Amendment, ALA. CONST. art. I, § 3.01; Arizona Religious Freedom Restoration Act, ARIZ. REV. STAT. §§ 41-1493 (LexisNexis 1998); Connecticut Religious Freedom Restoration Act, CONN. GEN. STAT. § 52-571(b) (1993); Florida Religious Freedom Restoration Act, FLA. STAT. §§ 761.01-761.05 (1998); Idaho Religious Freedom Restoration Act, IDAHO CODE ANN. § 73-401 (1999); Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. § 35/1 (1998); Missouri Religious Freedom Restoration Act, MO. REV. STAT. § 1.302 (2003); New Mexico Religious Freedom Restoration Act, N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (West 2000); Oklahoma Religious Freedom Act, 51 OKLA. STAT. ANN. tit. 5 §§ 251-258 (2000); Rhode Island Religious Freedom Restoration Act, R.I. GEN LAWS § 42-80.1-1 (1993); South Carolina Religious Freedom Act, S.C. CODE ANN. §§ 1-32-30 to 1-32-60 (1999); Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-110.012 (Vernon 1999). For state constitutional provisions applying the compelling interest standard, see Attorney General v. Desilets, 636 N.E. 2d 233 (Mass. 1994); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) State v. Miller, 549 N.W.2d 235 (Wis. 1996).

Moreover, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") also applies the compelling interest standard to state land use regulations and to state regulations of free exercise for institutionalized persons. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc). The Court has upheld the application of section 3 of RLUIPA to state prisoners' free exercise. *See* Cutter v. Wilkson, 544 U.S. 709 (2005).

[60] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1993)).

understood,[61] the federal government may not, as a statutory matter, "substantially burden" a person's religious exercise "even if the burden results from a rule of general applicability."[62] The only exception recognized by the statute requires the federal government to satisfy the compelling interest test, to "demonstrat[e] that the application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[63]

1. The Citizen Competitor's Prima Facie Case

The Court's latest analysis of RFRA identifies three components of a free exercise prima facie case: the demonstration of "a [1] substantial governmental burden to [2] sincere, [3] religious exercise."[64] Taking the last two components first, the Court holds that because "[c]ourts are not arbiters of scriptural interpretation,"[65] nor do they sit as heresy tribunals,[66] courts "should not undertake to dissect religious beliefs [or practices]."[67] Moreover, because religious exercise "need not be acceptable, logical, consistent, or comprehensible to others,"[68] or "shared by all of the members of a religious sect,"[69] or "compelled by, or central to, a system of religious belief,"[70] courts generally should give considerable credence to the petitioner's understanding of

---

[61] As originally enacted, RFRA applied to states as well as the Federal Government. In *City of Boerne*, the Supreme Court held the statute's application to states was an unconstitutional exercise of Congress's Section 5 enforcement power under the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[62] 42 U.S.C. § 2000bb-1(a).

[63] 42 U.S.C. § 2000bb-1(b).

[64] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (UDV), 546 U.S. 418, 428 (2006).

[65] Thomas v. Review Bd., 450 U.S. 707, 716 (1981).

[66] United States v. Ballard, 322 U.S. 78, 86 (1944).

[67] *Thomas*, 450 U.S. at 715.

[68] *Id.* at 714.

[69] *Id.* at 715-16.

[70] Congress subsequently clarified the statutory meaning of "religious exercise" under RFRA to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (amended 42 U.S.C. § 2000bb-2(4) of RFRA to read "[r]eligious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A)).

what constitutes her "religious exercise." Finally, courts should determine the sincerity of religious belief by only making a finding of "honest conviction" on the part of the petitioner.[71]

The wide latitude given the petitioner, on both the scope of religious practice and the sincerity of religious belief, is the unsurprising result of establishment concerns that would ensue if courts were to hold otherwise. This judicial latitude also properly tracks the prescriptions (and proscriptions) of the non "market participant" metaphor. The metaphor generally prescribes government non-interference with citizen beliefs, actions, and orderings in the "religion market," and proscribes government engaging in "competitor" behavior in the market, such as government staking out a position on the proper contours of the market. Of course, even the Court recognizes that "[o]ne can . . . imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[72] But in cases that are not "bizarre," the petitioner is given a wide berth to establish both what constitutes her religious exercise and her sincerity.

The main concern for courts at this pleading stage is therefore the determination of what constitutes a "substantial" burden; unfortunately, RFRA is silent as to this. The only guidance given is in the House Report accompanying RFRA, which states "an expectation" that "the courts will look to [] religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened."[73] The pre-*Smith* case law essentially holds that two types of government regulation create "substantial" burdens: government regulations that render religious practice unlawful or illegal,[74] and government regulations that tend to coerce actions contrary to religious practice.[75]

---

[71] *Thomas,* 450 U.S at 716.

[72] *Id.* at 715.

[73] H.R. REP. NO. 88-103, at 6-7 (1993).

[74] *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (petitioner presents a prima facie case for substantial burden when the regulation "make[s] unlawful any religious practices of [petitioner]" or results in the "serious . . . choice [of] forsaking their religious practices or subjecting themselves to criminal prosecution").

[75] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (while acknowledging that a government logging road built through a ceremonial mountain site will "virtually destroy . . . Indians' ability to practice their religion," the Court states that the government's actions did not present a prima facie case of substantial burden because they had "no tendency to coerce individuals into acting contrary to their religious beliefs").

An additional gambit employed in pre-*Smith* case law was to define "substantial" by "central," i.e., the more "central" a practice is to a religion,

What if the regulation does not criminalize religious exercise or tend to coerce contrary actions, but indirectly, or incidentally, renders religious practice impossible? Surprisingly, the understanding of burden in pre-*Smith* case law arguably did not extend this far.[76] Nevertheless, it is counter-intuitive to hold that government's creation of conditions, resulting in the impossibility for rights-holders to effectuate their rights, is not (at least presumptively) a substantial burden on those rights. Another way of stating this: if the metaphor of non "market participant" starts from the constitutional presumption of government duties of non-interference with, and protection for, free exercise, then government regulations rendering the exercise impossible violate the proper constitutional presumption. Any adequate understanding of a prima facie case of "substantial" burden must include this type of burden.

Furthermore, RFRA never addresses discriminatory burdens on free exercise in cases where the impact of such burdens might be fairly insignificant.[77] Most courts that have addressed this issue conclude, correctly I believe, that discriminating burdens are to be included under RFRA's heightened scrutiny, even in cases where the effect of these burdens may not be substantial.[78]

Finally, some authors have suggested "secular" proxies for analyzing burdens in the context of free exercise. For example, it

---

then, if the practice is burdened, the more "substantial" the burden is to a religion. The difficulty associated with this approach is that it undermines the correct analysis that "[c]ourts are not arbiters of scriptural interpretation." *See Thomas*, 450 U.S. at 716. On the question of "centrality," the *Smith* Court essentially got it right. *See* Employment Div. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"). Even Justice Brennan, who proposed a "centrality" analysis of burden, eventually conceded that courts should not decide the issue of "centrality" but rather petitioners "would be the arbiters of which practices are central to their faith." *Lyng*, 485 U.S. at 475 (Brennan, J., dissenting).

[76] *Lyng*, 485 U.S. at 450.

[77] For example, a regulation charging parochial students, but not public school students, an additional dollar per week to ride the bus to and from school.

[78] *See, e.g.*, Brown v. Mahaffey, 35 F.3d 846, 849-50 (3d Cir. 1994) (mentioning that RFRA's substantiality threshold does not reference discriminatory burdens but holding that, nevertheless, RFRA's compelling interest standard does apply to such burdens). The *Smith* Court was not wrong in identifying discriminating regulations as substantial burdens. *See supra* note 34 and accompanying text. However, it was wrong in identifying discriminating regulations as the *only* substantial burdens on free exercise. Even the *Smith* Court recognized that this constricted understanding of burden would not apply to most government regulations of religious exercise. *Smith*, 494 U.S. at 877 ("no case of ours has involved the point").

has been suggested that courts could reference a doctrine from free speech and look to "the availability of adequate alternative" religious practice in order to gauge the substantiality of the burden on free exercise.[79] This proxy may work for regulations that effectively render free exercise impossible. By anyone's definition of "adequate alternatives," there are no "adequate" alternatives where there are no alternatives at all. If government regulates free exercise rendering performance impossible, or vastly more difficult, reference to the lack of adequate alternative practice does seem to establish a substantial burden on free exercise.

The concern with this suggested proxy, however, is that it assumes there might be adequate alternative practice in the practice of religion, similar to the adequate alternative expression of speech. I am not convinced of this similarity.[80] Religious practice is often ritualized in such a manner that *every* partial act is considered essential to the overall significance of the religious practice in question. Changing one part of a ritual changes the whole ritual. For example, will drinking grapefruit juice be an adequate available alternative in the Catholic or Jewish sacraments if government regulates all intoxicating substances, including wine? Will praying four times a day be an adequate available alternative for a Muslim to praying five times a day if government regulations would (for some reason) allow for the former but not the latter? In both of these examples, I believe a petitioner would (correctly) establish a substantial burden on free exercise,[81] although the secular proxy of "adequate alternative" practice may find otherwise.

Another suggestion proposes taking a doctrine usually associated with establishment and applying it to the prima facie case in free exercise.[82] Under the requirement of denominational

---

[79] *See, e.g.*, Dorf, *supra* note 4, at 1216-17.

[80] Professor Dorf recognizes this problem in citing to Professor Greenawalt, who explains that a person "who acts from religious conscience feels he has no alternative; a person expressing an idea wants to do so effectively, but probably does not feel some inner compulsion to use a particular means." Dorf, *supra* note 4, at 1215 (citing Kent Greenawalt, *Free Speech in the United States and Canada*, 27 LAW & CONTEMP. PROBS. 5, 5 (Winter 1992)).

[81] Under the category of substantial burdens that "tend to coerce actions contrary to religious belief."

[82] *See, e.g.*, Dorf, *supra* note 4, at 1217-18 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1133-36 (1990)).

neutrality, government cannot favor one religion over another.[83] Accordingly, courts could look to see if the burden imposed on a particular religious practice is excessive when compared to the burden imposed upon other religions having the same practices. If so, the lack of denominational neutrality would signal that a substantial burden has been placed on the practice in question. The limitation on using this "establishment" proxy is, of course, that it would only extend to the *same* religious practices shared by different religions, e.g., two religions have a Sabbath day as a "common" practice, and only one religion's Sabbath is burdened. Otherwise, courts would be comparing apples to oranges. Nevertheless, this proxy may potentially capture important differences between the burdens government places on minority religions versus majority religions in cases where these religions have the same practices.[84]

To sum up this discussion of "substantial" burden, the metaphor of non "market participant" counsels as broad a conception of burden as is found in burdens placed upon other fundamental interests. Justice Stevens correctly argues that "a [government]-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character . . . [i.e.,] either because the burden is too severe or it lacks a legitimate, rational justification."[85] Accordingly, the non "market participant" metaphor recognizes the following "substantial" burdens:

> (1) burdens that discriminate against religion, because they lack "a legitimate, rational justification";[86]

---

[83] *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[84] Compare the "denominational" reasoning in *Cutter,* where the Court dismisses the state's claim of religious favoritism (establishment) if it is required to accommodate petitioners' religious service because "[t]he argument, in any event, founders on the fact that Ohio already facilitates religious services for mainstream faiths." Cutter v. Wilkinson, 544 U.S. 709, 712 n.10 (2005).

[85] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 920 (1992) (Stevens, J., concurring in part, dissenting in part).

[86] Government regulations that discriminate only against religious exercise give rise to the inevitable inference that they are attempting to influence religious exercise; this is government "competitor" behavior in the "religion market" in its most stark form. *Cf.* Dorf, *supra* note 4, at 1184 (targeted regulation of rights "represents a kind of structural harm, in the same way legislation inconsistent with the principle of separation of powers or beyond the powers enumerated in Article I is harmful. These structural limitations serve the

> (2) burdens that render religious exercise unlawful or illegal, because they are "too severe";
> (3) burdens that coerce (or "tend" to coerce) affirmative acts in violation of religious belief, because they are "too severe";
> (4) burdens that render religious exercise impossible (or greatly more difficult) because they are "too severe"; and,
> (5) burdens that disproportionately burden the same religious practice shared by different religions, because the burden may be both "too severe" and it lacks "a legitimate, rational justification."

Each of the five listed burdens should constitute a "substantial" burden under the metaphor of non"market participant." Government regulations imposing such burdens should require compelling governmental justification. Often the question of burden will be conceded by government.[87] But in cases where it is not, courts must have as broad a conception of free exercise burden as found in the analysis of burdens placed upon our other fundamental interests.[88]

2. Government's Duty to Demonstrate a Compelling Interest and Lease Restrictive Means

Ample opportunity for a citizen competitor to make her prima facie case does not result, however, in a "system in which each

---

ultimate purpose of preserving liberty . . . [a harm] in this sense, [is] harmful in itself quite apart from the harm it causes to aggrieved individuals.").

[87] *See, e.g.*, Gonzales v. UDV, 546 U.S. 418, 426 (2006) (government concedes prima facie case where regulation under the Controlled Substances Act of "hoasca," a hallucinogenic substance, resulted in classifying religious sacrament as unlawful or illegal).

[88] Perhaps the wide berth given to petitioner's prima facie case under free exercise can be viewed in rough equipoise with the lax standing rules for petitioner's prima facie case under establishment. In each case, religion is treated uniquely but in rough equipoise—allowing fewer procedural hurdles for a petitioner's claim of government burden on religion under free exercise and fewer procedural hurdles for a petitioner's claim of government benefit to religion under establishment. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968). If this is so, then we should be concerned with the Court's latest foray into establishment standing requirements where the Court (arguably) improperly adjusts the rough equipoise between free exercise and establishment procedures. *See* Hein v. Freedom from Religion Found., 551 U.S. 587 (2007) (holding that establishment standing requirements do not extend to "executive" expenditures for religion but only to "congressional" expenditures for religion).

[religious] conscience is a law unto itself."[89] The metaphor of non "market participant" only prescribes prima facie or presumptive protection of private, autonomous religious choice and lifestyle—not an absolute presumption or right.[90] The presumptive protection is defeasible if government can present a countervailing compelling interest and demonstrate the use of the least restrictive means. Here again, federal statutory law closely comports with the non "market participant" metaphor.[91]

What constitutes a countervailing governmental "compelling" interest? Some writers have suggested that only government's protection of another individual right is sufficient to establish a compelling interest to regulate a right.[92] While this view correctly identifies the sufficient conditions required to justify government regulations, sufficient conditions are not always necessary. The pre-*Smith* case law can again serve as guide: "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of free exercise]."[93] Such "paramount" interests will include not only the preservation of the rights of other citizens,[94] but also the preservation of government,[95] as well as social and legal institutions,[96] through which citizen rights and

---

[89] On this point, the *Smith* Court essentially got it wrong. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[90] *Cf.* Thornton v. Caldor, 472 U.S. 703, 709 (1985) (rejecting the absolute weight of a right not to work on whatever day petitioners designate as their Sabbath because it "imposes on employers and [other] employees an absolute duty to conform their business practices to the particular religious practices of [petitioners]."). *See also* RAZ, MORALITY OF FREEDOM, *supra* note 48, at 165-92 (discussing the non-absolute nature of rights).

[91] *See, e.g.*, 42 U.S.C. § 2000bb-1(b).

[92] *See, e.g.*, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

[93] Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[94] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) ("[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death").

[95] Compare James Madison's defense of the Virginia Declaration of Rights (1776) when he states:

> [T]hat all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, Unless the preservation of equal liberty [of others] and *the existence of the State* are manifestly endangered.

JAMES MADISON ON RELIGIOUS LIBERTY 52 (R.S. Alley ed., Prometheus Books 1985) (emphasis added).

[96] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its

interests are protected. Accordingly, the non "market participant" metaphor affords government a fairly robust opportunity to argue from the protection of other citizen rights, the protection of government itself, and the protection of social and legal institutions, to demonstrate and establish that the claimed interest is a "paramount" or compelling governmental interest.

If government can demonstrate that paramount interests are endangered by private orderings in the "religion market," it must then also demonstrate the "impediment to those objectives that would flow from recognizing the *claimed* [religious] exemption."[97] Government will need "to show with [] particularity how its admittedly strong interest[s] . . . would be adversely affected by granting an exemption[]."[98] This particularized showing requires government both to consider and to articulate its rejection of a religious exemption on grounds that allowing the exemption would adversely affect or undermine the achievement of the paramount interests in question.[99]

As burdensome as the employment of the compelling interest test may sound in theory, requiring government to demonstrate a "paramount" interest and present its "consideration" and an articulated, "particularized" rejection of a religious exemption, does no more than return free exercise to its proper status as a fundamental right. As with the protection of all rights, the real danger probably lies in too much government regulation in practice.[100] Again, it must be stressed that application of the compelling interest test to free exercise claims under the non "market participant" metaphor does not result in a "system in which each conscience is a law unto itself."[101] If government, after consideration, can demonstrate that providing an exemption for a petitioner's religious exercise would adversely affect or undermine a paramount governmental interest—that the interest cannot be accomplished in another less restrictive way—courts should not grant the requested exemption. The metaphor of non "market participant" does prescribe a strong presumption in favor of lifting government burdens on citizens in the "religion market"; but this

---

citizens, to impose reasonable regulations [on free exercise] for the control and duration of basic education.").

[97] Gonzales v. UDV, 546 U.S. 418, 431 (2006) (citing *Yoder*, 406 U.S. at 213, 221 (1972)).

[98] *Id.* (citing *Yoder*, 406 U.S. at 236).

[99] *Id.* at 436 (citing 42 U.S.C. § 2000bb-1(a)).

[100] *Cf.* Dorf, *supra* note 4, at 1246 ("we feel a strong pull toward sustaining government power . . . [w]ithout minimizing the risk of over-enforcement of rights . . . the real danger probably lies in the other direction").

[101] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

presumption is, similar to the presumption of other fundamental interests, a rebuttal presumption.

This brief analysis of how the metaphor of non "market participant" should be applied in free exercises cases indicates that the prescriptions of the metaphor closely comport with, given a few modifications, the current heightened scrutiny provided for free exercise under federal statutory law. The risk I run in proposing the new metaphor is, of course, that the prescriptions of the metaphor would require courts to apply this doctrinal test in state law cases, thereby, effectively overruling the current constitutional test for state regulations of free exercise prescribed under *Smith* and its progeny.

B. Non "Market Participant" and Establishment

The metaphor of non "market participant" interprets the constitutional text that government "shall make no law respecting an establishment of religion" as expressly proscribing actions in which government either enters the "religion market" as a competitor, or engages in "competitor behavior" in that market. As a result of its vast resources and its special status, government competitor behavior "risks crowding out private observance and distorting the natural interplay between competing beliefs."[102] When government actions violate this proscription, only the most paramount interests and the employment of the least restrictive means will justify such incursions. If government is competing in another market, however, then the proscription of the metaphor is not necessarily violated. In cases where public aid or support is universally available, although religion would also receive the aid or support, government provides a prima facie justification that it is not competing in the "religion market" under the metaphor of non "market participant."[103]

How do courts identify government actions that do engage in "competitor behavior" or "breach the close" of the "religion market"? Certainly, courts cannot defer to government in answering this question. Instead, courts must look either (1) to the behavior of citizen competitors in the "religion market" or (2) for the hallmark that government is competing in another market, i.e., that the government aid or support of religion is also aid or support

[102] McCreary County v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

[103] *See supra* text accompanying notes 57-58.

that is universally available.[104] If government actions exhibit close similarities to the actions of citizens in the "religion market," then government actions generally are proscribed by the metaphor of non "market participant." If public aid or support of religion is the type of aid or support that is not universally available without regard to religion, then the aid or support generally is proscribed by the metaphor of non "market participant." Again, when government actions are proscribed by the metaphor, only the most paramount interests and the employment of the least restrictive means will justify such incursions.

In some cases, determining whether particular government actions are violations of the metaphor will be a very close call, a difficult matter of degree, requiring courts to compare carefully the similarities of the actions in question and to gauge carefully the general availability of the public aid or support. In other cases, the call will be more obvious. Fortunately, the two major areas of establishment jurisprudence that will be examined next, government religious speech and public aid of religion, tend toward more obvious resolutions.

1. Government Religious Speech

Government religious speech is one major area in which the metaphor of non "market participant" and the metaphor of the marketplace of ideas part company. In the area of religion clause jurisprudence, government is not a participant in the market in the "free trade" in religion. In the area of free speech, government is a vital participant in the "free trade of ideas."[105] The reasons for this prescriptive difference are fairly easy to discern: first, government religious speech, whether prayer, expression, or display, is very similar to paradigmatic private "competitor behavior" in the "religion market." These actions are very typical of what citizens do in the "religion market." To allow government to compete in the market, risks distorting citizens' ordering of the outcomes of the market. It is for citizens, not government, to pray or not to pray, to display or not to display, and to express or not to express their religious beliefs.

Additionally, when government speaks religiously it is incapable of speaking without expressing a particular religious

[104] *See supra* notes 28-30 and accompanying text.
[105] *See supra* notes 57-58 and accompanying text.

viewpoint, or viewpoints.[106] For citizens in the market, this is not a problem; it is part and parcel of what competition in the "religion market" is about. But for government it means that the public support of the particular religious viewpoint in question is not universally available to other religious viewpoints inside, and more importantly, other non-religious viewpoints outside the "religion market." Government religious speech cannot therefore present a prima facie justification that its expression is intended to compete in a different market than the "religion market." Government religious speech is therefore placed squarely inside the "religion market" under both analyses of the non "market participant" metaphor. Accordingly, government religious speech must be justified by only the most paramount interests and the use of the least restrictive means in order to be constitutionally permissible.

a. Prayer

The Supreme Court's case law generally proscribing government prayer comports with the proscriptions of the metaphor.[107] Unfortunately, the Court apparently ties its proscriptions to the public school setting. Outside of the public school context, government prayer is apparently permitted.[108] Whether it is the lesser susceptibility of the audience[109] or the

[106] Even those members of the Court who favor certain types of government religious speech concede that if it "had to be entirely nondenominational, there could be no [government] religion in the public forum at all." *See, e.g.*, *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting). Instead, these members settle for the more limited goal of government religious speech acknowledging "beliefs widely held among the people of this country." *Id.* at 894.

[107] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (state may not compose or require recitation of public school prayer); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (state cannot require daily Bible reading and recitation of the Lord's Prayer in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down statute authorizing moment of silence "for mediation or voluntary prayer" where legislative history demonstrated intent to return prayer to public schools); Lee v. Weisman, 505 U.S 577 (1992) (striking down public middle school policy where school officials "direct" and "decide" to perform a Benediction that requires student "participation in prayer"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down public high school policy permitting "religious ceremony" at football games).

[108] Marsh v. Chambers, 463 U.S. 783 (1983) (permitting legislative chaplain to deliver daily prayer).

[109] *Id.* at 792 ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination.'").

"history and tradition" of the prayer,[110] the Court is not clear. Nevertheless, government prayer in whatever form or setting remains paradigmatic "competitor behavior" under the non "market participant" metaphor. If any government action competes in the "religion market," government prayer certainly does. Accordingly, government must demonstrate a paramount interest and the use of the least restrictive means for such incursions.

Even the Court concedes that a history and tradition of violation does not justify current violations of the correlative governmental duties not to compete in the "religion market."[111] The Court claims that there is "far more" justification for government prayer outside the public school setting than history and tradition, but it never identifies what this additional interest is.[112] The non "market participant" metaphor affords government a fairly robust opportunity to demonstrate a paramount interest by demonstrating the protection of the rights of others, the protection of government, and the protection of social and legal institutions.[113] Thus far, the Court has not identified a paramount interest for government prayer in any setting.

Government statutes or policies permitting a "moment of silence" are a closer call. In these cases, government is not composing, conducting, or requiring a prayer. Arguably, a moment of silence is not inherently religious at all.[114] Government's interest in these cases may be to permit the free exercise of citizens who wish to pray, without burdening the competing rights of other

---

[110] *Id.* at 790 ("In this context [Congress approves pay for Chaplain three days before approval of final First Amendment language], historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also how they thought the Clause applied . . . their actions reveal their intent."). Even if this "unique history" justifies legislative prayer, does it also justify further appeals to history and tradition that are not as contemporaneous?

[111] *Id.* ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

[112] The Court further argues that legislative prayer has "no more potential for establishment" than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations. *Id.* at 791. Under the non "market participant" metaphor, however, this "comparative" argument is not valid. Each of the listed comparisons is (arguably) a case of public aid or support that is universally available. Accordingly, in these cases government can present a prima facie justification that it is not competing in the "religion market." The same cannot be said for government prayer.

[113] *See supra* notes 94-96, and accompanying text.

[114] Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring) ("[A] moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise.").

citizens who do not wish to pray.[115] This would be a paramount interest under the metaphor of non "market participant." These cases arguably do regulate free exercise,[116] but probably for the paramount reason of protecting the rights of others. On balance, these statutes and policies should be constitutionally permissible under the metaphor of non "market participant."

b. Displays

Presumably, government religious displays face the same difficulties that government prayers face. Again, government behavior displaying sacred symbols or text is similar to private citizen behavior in the "religion market." Moreover, government religious displays are forms of government support for a particular religious viewpoint or viewpoints that is not universally available to other religious viewpoints within the "religion market," or available to non-religious viewpoints outside of the "religion market."

The Court has tried to justify government religious displays by either stressing the non-religious aspects of the displays or the "passive nature" of the displays. The non-religious aspects of a display usually refer to either the non-religious elements contained in the display,[117] or the role that the religious symbol or text has played in our legal, social, and political history.[118] The "passive"

---

[115] *Id.* ("During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others . . . .").

[116] Prayer is often required in communal settings in which there may be a "call and response" component. Additionally, individual prayer may require a "public" confessional or declarative component. Requiring such prayers to be silent arguably burdens such religious exercise.

[117] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting [i.e., a Santa Claus house, reindeer pulling Santa's sleigh, candy canes, circus figures, a teddy bear, hundreds of colored lights, and sign reading "Seasons Greetings"] changes what viewers may fairly understand to be the purpose of the display . . . negat[ing] any message of endorsement of that conduct"); County of Allegheny v. ACLU, 492 U.S. 573, 597-600, 614-20 (1989) (stating that "the government's use of religious symbolism depends upon context" and finding stand-alone crèche in courthouse unconstitutional but street location of menorah accompanied by Christmas tree and sign saluting liberty constitutional).

[118] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 688 (2005) (emphasizing "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America"); *Lynch*, 465 U.S. at 674-76 (1983) (emphasizing "the role of religion in American life from at least 1789"

aspect of the display usually refers to the non-proselytizing effect of the religious symbol or text.[119] These lines of defense are assumed to distinguish government religious displays from private religious displays, either placing them outside of the "religion market," or presumably presenting a paramount interest for government being in the market.

It is not at all clear that government religious displays can (or should) be distinguished as these lines of defense assume; or, if they do possess these qualities, that government religious displays are unique in these respects. Private citizen displays of religious symbols or text are not necessarily more proselytizing or inherently more "active" than government displays.[120] And it is doubtful that government religious displays always identify the non-religious aspects of the displays, whereas citizen displays do not.

Even if government religious displays can be meaningfully distinguished from private religious displays in those limited cases where there are additional non-religious components in the displays, they cannot avoid their selective support for a particular religious viewpoint, or viewpoints.[121] A crèche surrounded by

---

and "countless other illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage").

[119] *See, e.g.*, *Van Orden*, 545 U.S. at 691 ("The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."); County of Allegheny v. ACLU, 492 U.S. 573, 662 (2005) (Kennedy, J., concurring in part and dissenting in part) ("Noncoercive government action within the realm of flexible accommodation or passive acknowledgement of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage"). It is not clear from this line of defense whether "passive" displays of religious symbols and text are synonymous with displays that do not proselytize or coerce, or displays that do not "successfully" proselytize or coerce. If the former reading is correct, then probably both government and private displays are not passive (or they both are). If the latter reading is correct, then private displays are arguably more "passive" than government displays, given the special status and power attributed to government expression of support.

[120] *See supra* note 119. Of course, it would not be a problem for the metaphor of non "market participant" if private religious displays were primarily or always of a proselytizing nature, or of a "successful" proselytizing nature. The "free trade" in religion contemplates such private, citizen proselytizing taking place in the "religion market."

[121] *See supra* note 106. *See also Van Orden*, 545 U.S. at 717-18 (Stevens, J., dissenting) ("[D]espite the Eagles' best efforts to choose a benign nondenominational text, the Ten Commandments display projects not just a religious, but an inherently sectarian message. There are many distinctive

candy canes is still a crèche and not a menorah. The metaphor of non "market participant" therefore presumptively places such government actions inside the "religion market." This in turn requires government presentation of a paramount interest and the employment of the least restrictive means. The appeal to "history and tradition" or to "historical pedigree" has already been seen to be normatively inadequate in this regard.[122] The appeal to government religious displays being no "more beneficial to" religion than other government support is also unavailing.[123] And the recent justification for government religious displays—to acknowledge "beliefs widely held among the people of the country—"[124] is also not compelling. It is apparently contended that government needs to acknowledge which religions are "winning" in the market. Of course, this acknowledgement is something government cannot do without entering into the "religion market" itself.

Finally, government officials' religious expression is a closer call.[125] On the one hand, government officials' expression of their religious viewpoints will most likely be received as carrying the imprimatur of the power and prestige of government. On the other hand, these individuals are also citizens and possess the same right to free exercise as other citizens.[126] The metaphor of non "market

---

versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance.").

[122] *See supra* notes 44 and 111 and accompanying text.

[123] The Court also makes the now familiar argument that government religious displays are not "more beneficial to" religion than money for textbooks, school transportation, building funds, and tax exemptions. *See, e.g.*, *Lynch*, 465 U.S. at 681-82. Under the non "market participant" metaphor, however, this "comparative" argument is not valid. Each of the listed comparisons is (arguably) a case of public aid or support that is universally available. Accordingly, in these cases government can present a prima facie justification that it is not competing in the "religion market." The same cannot be said for government religious displays.

[124] *See, e.g.*, McCreary County v. ACLU 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (settling for the "more limited" goal of government religious displays acknowledging "beliefs widely held among the people of this country").

[125] *See, e.g.*, *Lynch*, 465 U.S. at 675-77 (discussing Presidential Proclamations), and *Van Orden*, 545 U.S. at 686-87 (same).

[126] Compare Justice Steven's insights when he writes, "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity". *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting) (emphasis in the original).

participant" does not prescribe a "religion free" public square; it only prescribes a public square free from government as a competitor in the "religion market." On balance, the metaphor of non "market participant" probably should find the religious expressions of public officials to be constitutionally permissible.

2. Government Aid of Religion

Turning to public aid of religion, the metaphor of non "market participant" takes seriously both the question asked by and the answer given in the Court's first case incorporating establishment—*Everson v. Board of Education*.[127] The question asked was: how do courts draw the difficult line between constitutional and unconstitutional public aid of religion?[128] The answer given, despite the opinion's strong language of separation,[129] was: government aid of religion is constitutional if it is part of general, public welfare legislation.[130] However, if government aid *only* extends to religion, whether "one religion, [] all religions, or prefer[ring] one religion over another," then the public aid in question presumptively is unconstitutional.[131]

The Court reasoned that to preclude citizens "because of their faith, or lack of it,"[132] from receiving the benefits of public welfare legislation would "hamper [] citizens in the free exercise of their own religion" and thereby violate the commands of the amendment.[133] In other words, to exclude citizens from public welfare legislation *because* of their religion effectively discriminates against them, and potentially violates their free exercise. The Court would not read the proscriptions of establishment as violating the prescriptions of free exercise.

---

[127] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[128] *Id.* at 14 ("[Courts'] decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion").

[129] The opinion's strong language of separation but apparent conclusion of "commingling" led Justice Jackson to comment, "the most fitting precedent is that of Julia who, according to Bryon's reports, 'whispering 'I will ne'er consent,'—consented.'") *Id.* at 19 (Jackson, J., dissenting).

[130] *Id.* at 16 ("[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.").

[131] *Id.* at 15.

[132] *Id.*

[133] *Id.* ("other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion").

This answer comports with the metaphor of non "market participant." Excluding religion from general, public welfare legislation seriously affects the private ordering of outcomes in the "religion market." It violates the set of governmental duties to not interfere with, and to protect, the private orderings of citizen competitors' free exercise.[134]

The important distinction drawn by the *Everson* Court is also extremely important to the metaphor of non "market participant" for another reason, primarily a reason concerned with establishment: it identifies when government is competing in the "religion market" and when government is competing in a different market. Only the former is proscribed by the metaphor of non "market participant." Accordingly, if government can demonstrate that the public aid in question is part of general, public welfare legislation, that the aid is universally available, then government presents a prima facie justification that it is not competing in the "religion market;" and thereby that the aid of religion presumably is constitutional under the non "market participant" metaphor.

It follows that in cases dealing with general, public welfare legislation, the non "market participant" metaphor prescribes that the aid should be extended to religion. The Court's holdings dealing with public provisions for school transportation,[135] school books,[136] remedial education,[137] class room materials,[138] building materials,[139] tuition deductions,[140] tax exemptions,[141] government subsidies to qualifying colleges and universities,[142] and special

---

[134] Compare Professor Laycock's insights when he writes:

> Police and fire protection [viz., public welfare legislation] are such a universal part of our lives that they have become part of the baseline. To deny police and fire protection would be to outlaw religion in the original sense of that word—to put religion outside the protection of the law. To demand that churches provide their own police and fire protection in a modern society would be to place an extraordinary obstacle in their way—a discouragement that would make religion a hazardous enterprise indeed. . . . The discouraging effect of cutting off basic services greatly exceeds the encouraging effect of providing them.

Laycock, *supra* note 46, at 1005.

[135] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[136] Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

[137] Agostini v. Felton, 521 U.S. 203 (1997).

[138] Mitchell v. Helms, 530 U.S. 793 (2000).

[139] Tilton v. Richardson, 403 U.S. 672 (1971).

[140] Mueller v. Allen, 463 U.S. 388 (1983).

[141] Walz v. Tax Comm'n, 397 U.S. 664 (1970).

[142] Roemer v. Md. Bd. of Pub. Works, 426 U.S. 736 (1976).

needs students,[143] to name but a few cases, conform to the prescriptions of the metaphor. In each of these cases, the provision of generally available aid without regard to religion presents government with a prima facie justification under the metaphor that it is not competing in the "religion market."

Additionally, in cases in which government provides a public forum or public access for speech, which again should be available to all without regard to religious preference, the metaphor of non "market participant" prescribes that the forum or access should be made available to religion.[144] The Court's analysis of this line of cases again conforms to the prescriptions of the metaphor.[145] In each case, government can make a prima facie demonstration that the provision of assistance, which includes religion, is not directed at the "religion market."

However, in those cases of public aid in which the aid is only made available to religion, whether to "one religion, [] all religions, or prefer[ring] one religion over another,"[146] government cannot appeal to the justification that it is competing in another market. Instead, the presumption is squarely placed upon government that it is engaging in "competitor behavior" through its aid to religion. In such cases of governmental "tithing" to religion, similar to the support of citizens for their religious preferences, the burden shifts to government to demonstrate a paramount interest and the employment of the least restrictive means for such incursions into the "religion market."

Perhaps the most famous cases of preferential government aid to religion are the state funding proposals consolidated in *Lemon v. Kurztman*.[147] In order to "enhance the quality of secular education in all schools covered by the compulsory attendance laws,"[148] the states of Pennsylvania and Rhode Island proposed funding for

---

[143] Witters v. Wash. Dep't. of Services for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[144] Compare Professor Laycock's analysis that "[t]he supporters of equal access argued that once classrooms were made available to other extracurricular groups, the use of the room was part of the baseline—a background norm that both religious and secular groups could take for granted." Laycock, *supra* note 46, at 1006.

[145] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993); Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2000).

[146] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[147] Lemon v. Kurztman, 403 U.S. 602 (1971).

[148] *Id.* at 613.

parochial school teachers[149] in order to offset the rising costs of religious education.[150] Because funding is not generally available to all teachers under the non "market participant" metaphor, government cannot present a prima facie justification that it is not competing in the "religion market." Instead, government must demonstrate a paramount interest and the use of the least restrictive means. Here, the interest in enhancing the quality of education in all schools is (arguably) a paramount interest. But the means employed are hardly necessary. Government would have to demonstrate that its paramount interest cannot be achieved, that it will be undermined, unless the funding of religion is permitted.[151] Needless to say, state government's ability to enhance secular education was not, and is not, undermined by the Court (correctly) proscribing these preferential funding proposals.[152]

Finally, those cases in which government "arguably" is competing in another market but desires religious "trading partners" in that market are closer calls.[153] These are the difficult cases that chiefly deal with the provision of social services.[154] On the one hand, it may be assumed that the provision of social services is already being provided in the market by non-religious providers,[155] so the addition of religious providers to the list of "trading partners" is making the aid generally available to all providers, regardless of religious preference. If this is so, then government may be able to present a prima facie justification that it is not competing in the "religion market" and, thereby, that the aid is constitutionally permissible.

---

[149] *Id.* at 607-11. Pennsylvania also proposed funding for textbooks and instructional materials, as well as teacher's salaries. *Id.* at 609.

[150] *Id.* at 609.

[151] Compare the corresponding set of governmental duties in free exercise. *See supra* text accompanying notes 97-101.

[152] *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down state funding for maintenance and repair of nonpublic schools, tuition reimbursements for parents of nonpublic school children, and tax relief for parents of nonpublic school children).

[153] I say "arguably" competing in another market because the provision of social services can also be viewed as a religious duty in some religions.

[154] *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-93, 110 Stat. 2105 (codified at 42 U.S.C. § 604A) ("Charitable Choice" provisions) *and* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (providing vouchers to public school parents for non-public education, including religious schools).

[155] Without this assumption, the aid in question falls into the category of governmental preferential aid extended only to religion. *See supra* text accompanying note 146.

On the other hand, many religions are already competing in the market for social services and the additional aid may skew the "religion market" in the sense that other non-competing religions may now be forced to compete in the social services market where they would not have competed before.[156] Additionally, those religions that are competing in the social services market before the provision of aid may have to change the way they compete after accepting the provision of government aid; such as requiring nondiscrimination against beneficiaries of the aid.[157] If this is so, then the proscriptions of the non "market participant" metaphor are fully engaged in order to avoid "crowding out private observance and destroying the natural interplay between competing beliefs."[158]

The non "market participant" metaphor requires that we be "eternally vigilant"[159] over the ordering and outcomes of the

---

[156] Compare Professor Blasi's insights when he writes:

> Consider the possible impact of a voucher scheme on a denomination that historically has devoted its resources to missions aimed at the poor and not to sectarian education. Imagine the dynamics if, under a voucher system, the leaders of the religion feel pressured to invest in sectarian education simply to keep up with rival denominations that are successfully recruiting and then proselytizing voucher students. Apart from that kind of scenario, we might fear that a voucher system would induce religions to entrust their educational programs not to the most devoted and skilled teachers of the faith, but to persons who possess the entrepreneurial talents necessary for success in the competition for students. That might be considered a form of corruption that is none the less so for having been freely chosen, under the circumstances, by the proper religious authorities.

Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions From Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 797-98 (2002).

[157] *See, e.g.*, 42 U.S.C. § 604A(g) ("a religious organization shall not discriminate against any individual in regard to rending assistance under any program described in subsection (a)(2) of this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.") *and Zelman*, 536 U.S at 645 ("Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred to any person or group on the basis of race, ethnicity, national origin, or religion.'").

Of course, the argument that religious providers chose to take the money offered and thereby waived their right to take it without the conditions attached does not answer the most important question under the non "market participant" metaphor: Should *government* offer to make the deal?

[158] McCreary County v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

[159] *See supra* text accompanying note 54.

"religion market."[160] Thus far there has been no significant showing of skewing that market's ordering or outcomes as a result of government aid to religious providers of social services; or, if there has been such distortion, there are probably paramount interests for the distorted outcomes.[161] On balance, and it is a close, difficult balance indeed, the non "market participant" metaphor probably should find government aid for the provision of social services by religious providers to be constitutionally permissible.

This brief analysis of how the metaphor of non "market participant" should be applied in establishment cases indicates that the prescriptions of the metaphor sometimes conform to the prescriptions of the historic metaphors of separation and neutrality, and other times does not. In the case of government religious expression, the non "market participant" metaphor generally comports with the historic metaphor of separation. Other than "moments of silence" and officials' religious expression, the metaphor generally proscribes government religious expression. In the cases of government aid of religion, the non "market participant" metaphor generally conforms to the prescriptions of neutrality. In cases where the aid is part of general, public welfare legislation or is part of government competing in a different market, the non "market participant" metaphor and the neutrality metaphor generally find the aid to be constitutional, but perhaps for different reasons.

C. Anticipated Criticisms

1. Free Exercise

Several writers have claimed that reinserting courts into case-by-case analyses of free exercise claims would stretch the competencies of the judicial branch beyond their breaking point. Either courts will tend to devalue the government interests employed to regulate free exercise,[162] or they will devalue minority

---

[160] *See supra* text accompanying notes 50-57.

[161] For example, requiring nondiscrimination from all providers of social services, including religious providers, is a paramount interest under the non "market participant" metaphor because it is the protection of the fundamental interests of citizens.

[162] *See, e.g.*, Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good,* 2004 B.Y.U. L. REV. 1090, 1215 ("The courts do not have the tools or the resources to investigate the larger public good and therefore are in no position to determine whether an exemption should be carved out of a particular law. The exemption decision properly belongs to the body entrusted with ensuring the public good—the legislature—which is situated

religious practices because they "will bear the brunt of the definitional and the sincerity inquiries."[163]

These lines of concern are blunted somewhat because courts have been applying the suggested doctrinal test, or something very close to it, for more a decade in federal statutory law. So far, there have been no apparent difficulties in courts handling these cases.[164] Courts do not appear to devalue the government interests—if anything, courts feel a pull in the other direction[165]—nor do they appear to devalue the minority religious practices involved. In the cases to reach the Supreme Court under a heightened scrutiny standard, the Court has found in favor of the religious practices of Satanists, Wiccans, Asatrusians, the Church of Jesus Christ Christians, and the 130 members of the Brazilian Spiritualist sect of "Uniao Do Vegetal."[166] Although this is a very small sample from which to draw conclusions, it seems fair to say that the religious practices involved in these cases were not "mainstream" religious practices. By proceeding through the courts in this sensitive area on a case-by-case basis, at least the petitioner gets the chance to have her day in court without first having to demonstrate "significant political clout," which is the threshold requirement for legislative protection and the main avenue of free exercise protection under the new metaphor of neutrality.[167]

More importantly, instituting a heightened standard of judicial scrutiny for government burdens on religious practice serves an important "preventative" function: it tends to prevent the

---

through its many contacts with the people and its access to wide-ranging, independent investigation to determine how particular religious practices will impact and therefore potentially harm citizens.").

[163] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991). *See also* Mark V. Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373 (1989) (claiming "only Christians win free exercises cases").

[164] *See, e.g.*, *Gonzales*, 546 U.S. at 436 ("We affirmed just last term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules. In Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113 (2005) . . . [w]e had 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose. *Id.* at 2122-23. Nothing in our opinion suggested that courts were not up to the task.").

[165] *See supra* note 100.

[166] *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) and *Gonzales*, 546 U.S. 418.

[167] *Cf.* Laycock, *supra* note 46, at 1016 ("For a variety of reasons, therefore, we cannot always rely on legislatures to protect minority religious conduct. Courts are not always better, but they give religious liberty claims a second chance to be heard.").

enactment of laws that burden religious liberty in the first place. Court enforcement of heightened scrutiny in this area places government on *notice* that its regulations will have to avoid, if possible, interfering with religious practice. This notice should become internalized and normative. If this happens, petitioners may find that they have fewer cases to bring to the courts because government, mindful of heightened judicial scrutiny, has not enacted regulations burdening their free exercise in the first place.

Some writers also claim that reintroducing the compelling interest test for free exercise is improper government "favoring" of religion over secular beliefs and practices and, thereby, runs afoul of the Establishment Clause.[168] Of course, this notion of "favoring" only follows if one accepts the metaphor of neutrality. Lifting burdens on free exercise alone cannot be normatively justified under the evenhanded prescriptions of neutrality requiring the same treatment of religion and non-religion.[169] But this metaphor has already been shown to be normatively inadequate.[170] Additionally, this position improperly equates the normative significance of government *duties* with government "favors." The correlative governmental duties grounded by the right of free exercise are not matters of grace; they are required by the strength of the right of free exercise. A personal interest too weak to ground correlative duties is not a personal right. The proper understanding of the meaning of rights depends upon this normative difference. For example, if you have been incarcerated in violation of your rights, government is not doing you a "favor" by freeing you.

Finally, it is assumed that reintroducing courts to the case-by-case analysis of free exercise petitions will open up the "floodgates" of litigation swamping the judicial system. Under the current neutrality metaphor, courts have left the field to legislatures. Any proposal to return to the judicial protection of free exercise probably will require an increase in court resources and time. However, the assumed "swamping" of the courts is speculative at best. The "flood of litigation" argument, while often raised, is also often exaggerated. Moreover, it is a poor argument for denying recovery for any genuine injury to our constitutional rights. As Professor Prosser writes in another context dealing with similar allegations:

---

[168] *See, e.g.*, Marshall, *supra* note 163, at 320.

[169] However, those who hold this position have to explain why legislative accommodations of free exercise are apparently permissible, while constitutional accommodations are not. Legislative accommodations also appear to be a violation of evenhanded treatment.

[170] *See supra* text accompanying notes 26-44.

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation" . . . in the words which Chief Justice Holt made famous in another connection, "it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense."[171]

The judicial system, critics notwithstanding, apparently managed quite well under the "floodgates" of free exercise litigation in the pre-*Smith* period. It will do so again if the compelling interest test is reinstated. Furthermore, the potential flood of litigation may be stemmed by the "preventative" function mentioned earlier.[172] Government regulations improperly burdening free exercise may decrease, and petitioner religious liberty claims as well, as a result of government's *ex ante* notice that heightened judicial scrutiny will be applied to any and all of its enactments.

2. Establishment

Perhaps the most salient criticism to be raised against the non "market participant" metaphor in the area of establishment is that it requires the courts to police the boundaries of the "religion market." Candidly, it does. Courts, it will be pointed out, are parts of government and as such they also should be non "market participants" in the "religion market" under the metaphor. But if courts are to police the boundaries of the "religion market," they must determine the boundaries of the market. And such determinations are prototypical of actions taken by participants in that market. The metaphor apparently proscribes the very thing it prescribes.

The answer forthcoming under the metaphor is that there is a normative difference between government participating *as* a competitor in the market, which is proscribed by the metaphor, and government protecting competitors in the market so that they can compete, which is prescribed under the metaphor. This difference

---

[171] William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939) (quoting Ashby v. White, 2 Ld. Raym. 938, 955 (1703)).

[172] *See* discussion *supra* text accompanying notes 167-168.

will require government to take its lead on these issues from the private orderings, choices, and acts of citizens. The judicial determinations of the boundaries of the market therefore *must* be based upon evidence of the private orderings, choices, and acts of citizens. Such determinations have no independent normative justification if based on the actions of other parts of government or on other court rulings.

Of course, citizens acting in the market need not make such reference to other citizens' behavior in the market; this is what it means to be a competitor in the market. But courts must do so in order to have any normative justification for the determination of the boundaries of the market. In this sense, courts do not participate in the market as competitors; or perhaps more accurately stated, courts do not participate *as* competitors participate in the "religion market." The only available normative justification for the courts' behavior in policing the market is the protection of citizen behavior in the market; because citizens, not government, determine the boundaries of the "religion market."

A comparison to courts policing other fundamental interests may be helpful here. In the free speech context, perhaps there is no more important distinction than the distinction between government regulations based on the content of the speech and government regulations that are content neutral.[173] As difficult as policing this distinction is for the courts, courts do not prescribe content-based regulations of speech when they enforce the proscriptions against such regulations. Neither should courts necessarily have to prescribe the boundaries of the "religion market" when proscribing government competitor behavior in that market.

But even if the protection of the market entails normatively different obligations than participating in the market, the question may again be asked: why should courts do the policing? Will these

[173] *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 641-42 (1994) ("the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue. Deciding whether a particular regulation is content-based or content-neutral is not always a simple task.") (internal citations omitted).

obligations stretch the competencies of the courts past their breaking points?[174]

However, there is no reason to believe that courts will have more difficulty policing the "religion market" than other fundamental interests. Moreover, the requirement that courts present their reasoning in writing may provide a unique check on these government actors. Courts must write down their rationales for policing the market and these rationales can be cross-referenced against the behavior of private citizens in the market. This transparency exposes the normative underpinnings of the court's action and reinforces the normative prerequisites for the action in the first place. Legislative enactments and executive orders do not face the same transparency requirements. The required transparency of judicial determinations provides an important and vital check on these government actors—one that is not present in the justification of other government actions under our constitutional system.

CONCLUSION

As a result of the radically under-determined constitutional text and drafting history, the Supreme Court's religion clause jurisprudence has always been dominated by a central metaphor or constitutional norm. The metaphor has primarily been employed to prescribe (and to proscribe) the proper legal and political relationship between government and religion. The historic metaphors of separation and neutrality chosen by the Court to accomplish this important task are normatively inadequate. The metaphor of separation is inadequate because it places the protection of free exercise in jeopardy and entails discrimination against religion in cases where government aid is universally available while unnecessarily pitting the prescriptions of free exercise and establishment against one another. The metaphor of neutrality is inadequate because it proscribes the use of the compelling interest test, effectively sacrificing the fundamental status of free exercise, and does not require non-discrimination against religion in cases of universally available aid while improperly embodying a preference for majority religions that is inconsistent with our nation's commitment to denominational neutrality.

As a result of these inadequacies, a new metaphor for religion clause jurisprudence may be necessary—the metaphor of

[174] *See supra* text accompanying notes 162-167.

government as a non "market participant" in the "religion market." This metaphor essentially combines two other metaphors found in constitutional jurisprudence, Justice Holmes's metaphor of the "marketplace of ideas" and the metaphor of "market participant" in the Court's Dormant Commerce Clause jurisprudence. The normative obligations of the metaphor both prevent government from regulating the behavior of citizen competitors in the "religion market" (free exercise) and prevent government from becoming a competitor or engaging in competitor behavior in that market (establishment).

In the context of free exercise, the non "market participant" metaphor returns the compelling interest test to its rightful place and generally sides with the prescriptions of the separation metaphor and not neutrality. This is the necessary result of the non "market participant" metaphor's commitment to private orderings, choices, and acts being solely determinative of the outcomes of the "religion market."

In the area of establishment, the non "market participant" metaphor generally sides with the prescriptions of the neutrality metaphor in cases of general, public welfare legislation. Under the non "market participant" metaphor, this is the necessary result of government presenting a prima facie justification that it is competing in a different market than the "religion market." However, in the area of government religious expression and in cases of government aid or support extended only to religion, the metaphor of non "market participant" generally sides with the separation metaphor and not neutrality. This is the necessary result of the non "market participant" metaphor's general proscription of government behavior that competes in the "religion market."

It is time to see beyond the enticing imagery of the Court's selected metaphors of separation and neutrality. The imagery has so captivated and transfixed the Court's gaze that the Court has lost its way navigating the serious normative inadequacies of both metaphors. The Court must return to a truer course in its religion clause jurisprudence, setting its sights on the single goal of maximizing religious liberty for citizens. Our nation's commitment to the religious liberty of our citizens requires no less from the Court, or from us. The metaphor of non "market participant" can serve as a guide and compass.